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October 14, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: MM Docket 92-266

On behalf of the Center for Media Education and the Consumer Federation of America, please find enclosed two copies of a written *ex parte* presentation for Chairman Reed Hundt regarding the above rulemaking.

Copies of this memo will be hand-delivered to the Chairman and Special Assistant Merrill Spiegel today.

Sincerely,

Jeffrey Chester
Executive Director

Enclosure

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List ABCDE

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MEMORANDUM

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: **The Hon. Reed Hundt**

From: **The Center for Media Education ("CME")**
The Consumer Federation of America ("CFA")[1]

Date: **October 14, 1994**

Re: **Non-Profit Rates for Leased Access Cable Channels and for Video Dialtone Capacity**

Introduction

In discussions with the Commission staff regarding non-profit rates for leased access cable channels, the question has arisen as to whether the FCC needs to consider this issue in tandem with non-profit video dialtone rates. It is CME's and CFA's view that the Commission does not, in light of the radically different ways in which cable television and common carrier services are regulated, and in light of the explicit provisions of the Cable Act and its legislative history.

In addition, the current cable leased access regime (now in force for approximately a year and a half) has a proven track record of blocking new non-profit leasing.

CME and CFA support incremental non-profit rates for video dialtone ("VDT") services as well as cable leased access. But this support is based upon the very different context of VDT.

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[1] The Center for Media Education ("CME") and the Consumer Federation of America ("CFA") each participated extensively in the Commission's rulemaking on leased access cable channels, filing detailed comments. CME has filed a Petition for Reconsideration in that proceeding. CFA and CME also participated in the Commission's video dialtone proceedings, and have filed a joint Petition for Reconsideration.

CME and CFA believe that there are four principal differences between cable television and VDT non-profit rate context, as follows:

1. <u>The Purpose of Cable Leased Access</u>.

Congress's purpose in establishing cable leased access was to create a First Amendment preserve that is entirely outside of the control of the cable operator, so that programming would be carried which the operator would not offer of its own volition. This governmental intervention was---and remains---necessary in light of the near-complete control over content which the operator exercises with respect to most of its channel capacity.[2]

The core of Congress's concern was to maximize the variety of program <u>sources</u> available to viewers.[3]

CME and CFA submit that if the Commission is truly to maximize both the program sources and content available to viewers, as the Act requires, it must assure that affordable leased access rates will be available for non-profit organizations.

None of this background or rationale applies to video dialtone, a common carrier service where the LEC is completely barred from control over content.

2. <u>The Cable Act Explicitly Requires Discriminatory Rates</u>.

In the Cable Act's legislative history, Congress clearly

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[2] See the 1984 House Report at 47 and the 1991 Senate report at 29-30.

[3] See Section 612(a) of the Cable Act, where Congress declares that its purpose is to "assure that the widest possible diversity of information sources are made available to the public from cable systems..." In 1992, the purpose of Section 612 was expanded to include the promotion of "competition in the delivery of diverse sources of video programming."

states that it expects that different lessees will pay different rates according to the nature of their use. For example, the 1984 House Report states:

> [B]y establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, such as those offered by not-for-profit entities, to have any reasonable expectation of obtaining leased access to a cable system.[4]

This approach by Congress is entirely different from the common carrier tenets applicable to video dialtone, which are based upon non-discriminatory rates.

3. Non-profit Entities Demonstrably Are Unable to Pay Commercial Leased Access Rates in the "All Other" Category.

As CME has pointed out in its Petition for Reconsideration, current maximum rates for non-profit organizations (the "all other" category) are astronomical.[5] For example, using the FCC "all other" rate figure of $0.50 per subscriber per month, it would cost the Audubon Society approximately $336 million annually to lease a full-time channel reaching all cable households---almost seven times the organization's total operating budget. A local non-profit programmer in Philadelphia leasing a full-time channel to serve all of the cable subscribers in that market would have to pay over $11 million per year.

In the period since the adoption of the Commission's current leased access rate structure, new channel leasing by non-profit

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[4] 1984 House Report at 51 (emphasis added).

[5] Petition for Reconsideration of CME, et al, in MM Docket 92-266, p. 12.

organizations has been almost nil.[6] This is a radically different result than the Commission anticipated in its initial leased access decision, when it said that it expected the maximum reasonable rates "will, at any rate, be sufficiently low as to attract potential not-for-profit programmers."[7]

While CME and CFA advocate incremental non-profit rates for VDT systems, it is not on the basis of currently unreasonable rates; as of this date, no regular VDT tariffs have been filed.

4. Leased Access Channel Capacity Is Much Scarcer than VDT Channel Capacity, Affecting the Need for a Channel Reservation.

Under Section 612(b) of the Cable Act, certain systems are required to lease less than 10% of their channel capacity---perhaps as few as two or three channels in the case of 36-channel systems. No cable system is required to lease more than 15% of its capacity. In light of this scarcity, CME has urged the Commission to require a capacity reservation for non-profit use: the greater of one full-time channel or 25% of leased access capacity.

Most VDT systems will have hundreds of channels available for lease. While a non-profit a reservation may be needed in the VDT context, obviously it will consist of far less than 25% of capacity.

Should you or members of the Commission staff have questions

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[6] This regime has also produced disastrous rate increases for a number of commercial leased access users.

[7] Report and Order and Further Notice of Proposed Rulemaking in the Matter of Impelementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Reulation, released May 3, 1993, at paragraph 526.

concerning this memorandum, kindly contact the following:

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